6-1800-16183-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Denial of the Foster Care License of Sophia Lofton

FINDINGS OF FACT, CONCLUSIONS, RECOMMENDATION AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on December 1, 2004, at the Office of Administrative Hearings in Minneapolis. The hearing lasted for less than a day, and the record closed at the end of the hearing on December 1, 2004.

Appearing on behalf of the Hennepin County Children, Family & Adult Services Department and the Minnesota Department of Human Services was Rebecca S. Morrisette, Assistant Hennepin County Attorney, 525 Portland Avenue South, 12th Floor, Minneapolis, MN 55415.

Appearing on behalf of Applicant Sophia Lofton was Sophia Lofton, 3355 Vincent Avenue North, Minneapolis, MN 55412.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

Is the Commissioner equitably estopped from denying an application for a foster care license when County employees told the applicant that a past criminal conviction should not be a problem and applicant submitted her application before applying for expungement of the criminal conviction?

Did County employees have a duty to inform applicant that she could withdraw her application and refile it after obtaining the expungement?

Has Sophia Lofton demonstrated that she does not pose a risk of harm to children such that her disqualification should be set aside?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Sophia Lofton was born in May of 1965. On June 15, 2001, when she was 36 years old, she was involved in an altercation outside of a bar in North Minneapolis. The altercation was with another woman. A police officer stated, in a complaint, that Lofton hit the other woman in the head with a bottle, knocking her down, that Lofton then threw the bottle at the windshield of a car, and then went into the car and hit the other woman about the head and the face with her fists.[1] The victim asserted that this all was true, except that Lofton did not hit her with a bottle, because Lofton threw the bottle at her but the victim was able to duck in time and the bottle did not hit her.[2]

2. The altercation resulted in a mutual restraining order being issued to both the victim and Lofton on August 23, 2001.[3]

3. Lofton was charged with assault in the fifth degree – harm, disorderly conduct, damage to property in the fourth degree, and assault in the fifth degree – fear.[4] On October 30, 2001, Lofton plead guilty to assault in the fifth degree – fear, a violation of Minn. Stat. § 609.224, subd. 1(1), a misdemeanor. The other charges were dismissed. Imposition was stayed pursuant to Minn. Stat. § 609.135, on the condition that there be no further assault charges, no contact with the victim, no further damage to property, no further disorderly conduct, no violation of the mutual protective order, no interference with 911 calls, and restitution. The court record notes "State does not object to expungement after 18 months, if all conditions met."[5]

4. On December 31, 2002, Lofton was discharged from probation. However, on January 6, 2003, an Order for Judgment in the amount of $80.65 was filed with Collteck, Inc., representing the balance of the restitution which Lofton had not paid. Collteck, Inc. is believed to be a collection agency.[6]

5. On September 30, 2003, in response to an inquiry from the State of Illinois pursuant to the interstate compact, Eva Zorn, a senior social worker with Hennepin County Human Services Department, visited Lofton's home for purposes of determining whether she might be a suitable foster parent for her niece and her niece's brother, B.L. and N.V., who were (and still are) in foster care in Illinois. Prior to going out to the home, Zorn had conducted a preliminary background check, and learned of the fifth degree assault. Zorn and Lofton talked about the incident. Lofton told Zorn that she was just about finished paying off the restitution claim. Zorn told Lofton that although she (Zorn) was not a licensing worker, she did not think that the assault incident would be a bar to Lofton's being licensed for foster care.[7]

6. On October 17, 2003, Zorn referred Lofton for a restricted family care license, and on October 27, Lofton completed her application. On the "Foster Care Licensing Questionnaire" of that date, Lofton disclosed the assault incident. [8]

7. On November 24, and December 11, 2003, Margaret Bedor, a foster care licensing worker for Hennepin County, visited Lofton's home while reviewing her application. Lofton discussed the assault incident with Bedor, and Bedor stated she did not think it would be a bar to licensure.[9]

8. On February 9, 2004, Anita Davis, Bedor's supervisor at Hennepin County, was reviewing Bedor's home study and her work on the application. Davis noted a small reference to the fifth degree assault incident, and looked through the file to learn more about it. She could not find the BCA report which she expected, and so she had a criminal record check run against BCA records. It disclosed details of the assault incident. Davis believed the assault conviction to be a serious issue.

9. On or about February 15, 2004, Davis called Lofton and told her that the assault created a problem with the processing of the application, and that Bedor would have to do a "disqualification process". Davis indicated this would delay a final decision, and apologized for not having had it done earlier. This was the first time that Lofton had been informed that there was going to be a problem with the application process, and she was upset. In the course of the telephone conversation, Lofton told Davis that she was on the verge of paying the last of the restitution, and that once she had done that she could have the whole matter expunged. It occurred to Davis that Lofton could withdraw the application and then refile it after the expungement, but Davis did not tell Lofton of that option. Instead, she told Lofton that there would have to be a disqualification analysis.

10. On February 25, 2004, Margaret Bedor prepared a risk of harm determination, rating Lofton's risk level as "Intermediate," based upon six statutory risk factors and four other factors contained in a county Risk of Harm Determination form.[10]

11. On February 26, 2004, Bedor sent a letter to Lofton, informing her that she was disqualified due to the assault incident. The letter informed Lofton of her right to request reconsideration and enclosed a form for that purpose.[11]

12. On March 12, 2004, Lofton sent a lengthy letter to Bedor, asking for a variance. Lofton acknowledged her lack of control at the time of the assault incident, indicating that she had apologized for it "over and over again." She disputed the suggestion that she posed any harm to children she was seeking to care for. She stated that she had three children of her own that she had raised as a single parent without any child support, as well as helping to raise two half-sisters who have graduated from high school and college. Lofton stated that she still owed $80 in restitution, but otherwise had satisfied all of the other conditions necessary for expungement. Lofton indicated that she was attending North Hennepin Community College and was at the end of her second year, having three classes before completion. She was majoring in law enforcement/criminal justice, and intended to move to Metro State University in the spring of 2005. Her long-term goal was to become a probation officer. She stated that the two children in Illinois had been taken from their parents and no other family members had stepped forward to adopt or care for them. She urged that the disqualification be set aside and that the disqualification be reconsidered.[12]

13. On March 15, 2004, Lofton also filed a copy of Bedor's February 26 letter with the County. Written across the bottom, Lofton asked that it be accepted as her appeal.[13]

14. In the course of telephone conversations between Davis and Lofton, Davis formed the opinion that Lofton did not really accept responsibility for the assault and that Lofton did not take it seriously. Davis found Lofton to be argumentative, rather than contrite.[14]

15. On March 23, 2004, the foster care management team at Hennepin County reviewed the disqualification. Nobody on the team was in favor of a variance. On April 26, 2004, the County recommended that the disqualification not be set aside, and that a variance not be granted. On that same date, the County recommended to the Commissioner that the Department deny Lofton's application for a restricted family foster care license.[15]

16. On June 29, 2004, the Honorable Stephen A. Pihlaja, Hennepin County District Court, ordered that Lofton's Petition for Expungement be granted, both as to the 2001 assault incident and an earlier, 1993 incident apparently involving driving a vehicle without a valid license, which resulted in a "giving false information" charge.[16]

17. Sometime after the expungements, Lofton provided copies to Bedor. Bedor then contacted DHS, and was told that the expungement "didn't matter" and that DHS was going to proceed with the denial.[17]

18. On September 1, 2004, the Department sent a letter to Lofton, indicating that the disqualification was not set aside, that no variance was granted, and that her application was denied.[18] The notice informed Lofton of her right to appeal and that a contested care hearing would include both the disqualification which was not set aside and the denial of licensure.[19]

19. On September 10, 2004, Lofton requested a contested case hearing.[20]

20. On September 21, 2004, a Notice of and Order for Hearing was issued, setting the hearing in this matter for December 1, 2004, in Minneapolis. The hearing took place on that date, and upon its completion, the record closed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter based on Minn. Stat. §§ 245A.07, 14.50 and Minn. Rule Part 9543.0100.

2. The Department, through Hennepin County, has complied with all substantive and procedural requirements of law or rule.

3. Minn. Stat. § 245C.14 provides that if a person is convicted of violating Minn. Stat. § 609.224 (as Lofton was), then the Commissioner shall disqualify the person if less than seven years has passed since the discharge of the sentence.

4. Minn. Stat. § 245C.16 provides that if the Commissioner finds a disqualification, then the Commissioner shall perform a risk of harm determination, considering seven factors, and if the Commissioner determines that there is a risk of harm, then he may order that the applicant be under continuous supervision of a license holder or adult caregiver.

5. Minn. Stat. § 245C.22, subd. 4, provides that the Commissioner may set aside a disqualification if he finds that the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm, considering eight factors listed in the statute. The statute directs the Commissioner to give "preeminent weight" to the safety of the persons to be served, and places the burden on the applicant to prove that she does not pose a risk of harm.

6. Minn. Stat. § 245C.30 provides that the Commissioner may grant a variance if there are conditions that minimize the risk of harm to recipients of services. That statute also provides that the Commissioner's denial of a variance is final, and not subject to appeal in a chapter 14 hearing.

7. Minn. Rule 2960.3020, subp. 11, provides that the Commissioner "shall" deny an application if a disqualification is not set aside.

8. Sophia Lofton was convicted of violating Minn. Stat. § 609.224, and less than seven years has passed since the discharge of her sentence. Therefore, under Minn. Stat. § 245C.14, she is disqualified from serving as a foster care parent.

9. Statements made to Lofton by Hennepin County personnel to the effect that the conviction should not be a bar to licensure, and that there was no reason to wait for expungement, were unfortunate and ill-advised. However, the law does not prohibit the Commissioner from denying a license because of them. See, Memorandum.

10. County personnel had no affirmative duty to inform Lofton that she could withdraw her application and wait until the expungement had occurred before resubmitting it. Their failure to do so does not prohibit the Commissioner from denying a license.

11. The attached Memorandum is incorporated by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner set aside the disqualification and grant Sophia Lofton's application for a restricted foster care license.

Dated this 29th day of December, 2004.

/s/ Allan W. Klein

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ALLAN W. KLEIN
Administrative Law Judge

Reported: Taped recorded, no transcript prepared

MEMORANDUM

There are two issues that require explanation beyond the Findings and Conclusions. The first is Lofton's claim that the Commissioner is equitably estopped from denying her a license, and the second is whether or not the disqualification should be aside based on the factors set forth in the statute.

Lofton argued that the Commissioner must, as a matter of law, grant her the license because County personnel told her that it was not necessary to wait for the expungement. An additional basis she cites was the failure of County personnel to tell her that she could withdraw her application, wait for the expungement, and then reapply. Both of these arguments fall within the doctrine of "equitable estoppel". A review of Minnesota caselaw demonstrates that there have been a handful of situations

where the government has been estopped from taking an action by virtue of an employee's misstatements, but there are many more cases where such a claim has been rejected. The standard to estop the government is high, and the Minnesota Supreme Court has cautioned that a party attempting to assert equitable estoppel against a government entity bears a "heavy burden of proof."[21]

To establish a claim equitable estoppel against the government, the Claimant must prove the following:

1. The government made a misrepresentation of a material fact;
2. The government knew the representation was false;
3. The government intended that its representation be acted upon;
4. The Claimant did not know the facts; and
5. The Claimant relied upon the government's misrepresentations to his detriment.[22]

In the case of Sophia Lofton, what is missing is the second element – that the government knew the misrepresentation was false. The law requires that the facts presented to support an equitable estoppel claim must be "clear, positive, and unequivocal in their implication."[23] There is no evidence to support a claim that either Eva Zorn or Margaret Bedor knew that the Fifth Degree Assault was going to end up as the basis for denying Lofton's application. Lofton knew that she had the option of expungement once she had paid the last of the restitution, and it may be assumed that she would have withheld or withdrawn her application had she known that the conviction would have resulted in denial. But Eva Zorn did not recall the details of her conversations with Lofton, and Bedor was not available to testify about them. Taking Lofton's descriptions of the conversation at full value, there is simply no evidence that either of the county workers knew they were wrong. The evidence on that point is far from "clear, positive, and unequivocal". So, the Commissioner cannot be estopped from denying the application.

Setting aside the disqualification is a close question. Lofton's assault appears to have been an isolated incident, and she appears to be striving to lead a productive life. She has a record of successful parenting. She is the only family member who is willing to step in and take on the job of parenting the two children now in Illinois.

But the statute directs the Commissioner to give "preeminent weight" to the safety of the children to be served. And it places the burden of proof on Lofton to show that she does not pose a risk of harm to them.

The statute lists seven factors for the Commissioner to consider: the nature, severity and consequences of the incident; whether there is more than one disqualifying event; the age and vulnerability of the victim; the harm suffered by the victim; the similarity between the victim and persons to be served; the time elapsed without a

repeat; documentation of successful completion of training and rehabilitation; and any other relevant information. Applying these to Lofton yields the following:

> The assault was of substantial severity but minimal consequences.
> There was only one disqualifying event.
> The victim was roughly the same age and vulnerability as Lofton.
> There is no similarity between the victim and the children to be parented by Lofton.
> Approximately three-and-one-half years have passed without a repetition of assaultive behavior or alcohol-related behavior.
> There has not been any documentation of training or rehabilitation which Lofton has completed.

A review of these statutory factors suggests that Lofton has met her burden to demonstrate that she does not pose a risk to the children. Are there "other relevant factors" which should be considered?

Lofton is argumentative. Anita Davis found her to be that way in their telephone conversations, and the Administrative Law Judge found her to be that way during the hearing. The Administrative Law Judge believes that her behavior was a factor in the County's decision to recommend against a set aside or a variance. But argumentative behavior is not a reason to deny a set aside when the statutory factors weigh in favor of it. Most importantly, there is no basis for equating verbal argumentation with physical assaults. Lofton does recognize that the assault was unacceptable behavior, and the record, taken as a whole, gives every indication that she will not harm the children that she seeks to parent. There is certainly no reason to believe that she would physically assault them. Given all of the facts in the record, the Administrative Law Judge believes that she has demonstrated that the disqualification should be set aside.

A.W.K.

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[1] Ex. 3.
[2] Ex. 16.
[3] Ex. 17.
[4] Ex. 3.
[5] Ex. 2, p. 5.
[6] Ex. 2, p. 8.
[7] Test. of Eva Zorn.
[8] Ex. 12.
[9] Test. of Sophia Lofton. Margaret Bedor was on vacation at the time of the hearing, and did not testify.
[10] Ex. 10.
[11] Ex. 8.
[12] Ex. 1, Attachment D.
[13] Ex. 9.

[14] Test. of Anita Davis.
[15] Ex. 1.
[16] Exs. 18 and 15, respectively. There was no allegation in the record that the 1993 incident was a factor in the County's decisions.
[17] Test. of Anita Davis, relating a telephone conversation or e-mail exchange between Bedor and Dennis Curran of DHS.
[18] Ex. 6.
[19] Ex. 6.
[20] Ex. 7.
[21] Brown v. Minnesota Dept. of Public Welfare, 368 N.W.2d 906 (Minn. 1985), and other cases cited in Beck, Minnesota Administrative Procedure, 2nd Ed. (Minneapolis, 1998), at § 12.3.
[22] REM–Canby, Inc. v. Minnesota Dept. of Human Services, 494 N.W.2d 71 (Minn. App. 1992), rev. denied (Minn. Feb. 25, 1993).
[23] Eliason v. Production Credit Association, 259 Minn. 134, 106 N.W.2d 210 (Minn. 1960).